

MARVIN E. BROWN  
IONE M. BROWN

IBLA 80-434

Decided January 6, 1981

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring abandoned and void appellant's placer mining claims, the Red Crystal Placer and the Pikes Peak Granite Placer. CMC 153538.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims:  
Abandonment--Mining Claims: Location--Mining Claims:  
Recordation

Where a person locates a mining claim on or before Oct. 21, 1976, the requirement of 43 U.S.C. § 1744 (1976) and 43 CFR 3833.1-2(a) concerning claims located prior to the enactment of FLPMA apply, and the owner has until Oct. 22, 1979, to record the location notice with BLM.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims:  
Abandonment--Mining Claims: Location--Mining Claims:  
Recordation

Under 43 U.S.C. § 1744 (1976) and 43 CFR 3833.4, the failure to file such instruments as required by subsection (a) and (b) of that section shall be deemed conclusively to constitute an abandonment of the mining claim, or mill or tunnel site by the owner.

3. Administrative Authority: Generally--Constitutional Law:  
Generally--Federal Land Policy and Management Act of 1976:  
Recordation of Mining Claims and Abandonment --Mining Claims:  
Abandonment-- Mining Claims: Location --Mining Claims  
Recordation

The Department of Interior, as agency of Executive Branch of Government, is not the proper forum to decide whether or not the recordation provisions of the Federal Land Policy and Management Act of 1976 relating to mining claims are constitutional.

APPEARANCES: William R. Tiedt, Esq., for appellants.

#### OPINION BY ADMINISTRATIVE JUDGE BURSKI

Marvin E. Brown and Ione M. Brown, hereinafter appellants, appeal from a February 1, 1980, decision of the Colorado State Office, Bureau of Land Management (BLM), declaring appellant's two mining claims, the Red Crystal Placer and the Pikes Peak Granite Placer, abandoned and void.

The claims in question were located on April 3, 1950. On October 19, 1979, appellants, through their attorney, submitted documents to BLM in compliance with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). These submissions consisted of proofs of annual labor for the two claims, maps showing their location, the requisite filing fee, and statements of ownership. Although these documents were timely received by BLM, the certificates of location were not included. Accordingly, appellants' documents were returned and their claims were declared abandoned and void by the decision of February 1, 1980. Appellants have subsequently submitted all of the required documents pursuant to the BLM notification.

[1, 2] Section 314 of FLPMA, 43 U.S.C. § 1744 (1976), required that the owner of an unpatented lode or placer mining claim located prior to October 21, 1976, make various filings with both state and Federal authorities by October 22, 1979. Included in these requirements was one relating to the filing with BLM of the notice of location of the claim. See 43 U.S.C. § 1744(b) (1976). The implementing regulation, 43 CFR 3833.1-2(a), provides, in relevant part, as follows:

The owner of an unpatented mining claim, mill site or tunnel site located on or before October 21, 1976, on Federal lands, \* \* \* shall file (file shall mean being received and date stamped by the proper BLM Office) on or before October 22, 1979, in the proper BLM Office, a copy of the official record of the notice or certificate of location of the claim or site filed under state law. If state law does not require the recordation of a notice or certificate of location containing the information in paragraph (c) of this section shall be filed.

Where a person had located a mining claim on or before October 21, 1976, the requirements of 43 CFR 3833.1-2(a) concerning claims located prior to the enactment of FLPMA apply, and the owner had until October 22, 1979, to record the location notice with BLM. H. L. Smith, 46 IBLA 62 (1980). Appellants do not contend that the notices of location were filed with BLM prior to the due date.

Appellants argue, however, that while they may have technically failed to comply with the recordation requirements, they should be allowed to cure the deficiencies and avoid the declaration of invalidity. We disagree.

This Board has already recognized that there are two categories of submissions under the regulations implementing FLPMA. First, there are those filings which are the minimum prerequisite to compliance with the statutory mandate and without which there is no recordation. Secondly, there are additional supplemental filings which claimants must submit, but for which allowances may be made if they are received untimely.

In effect, the Board has held that those regulatory requirements which are merely replications of the statutory mandates may not be waived by the Department. See Robert W. Hansen, 46 IBLA 93 (1980); H. L. Smith, *supra*.

With respect to the instant appeal, the statute requires in relevant part that:

The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location \* \* \*.

43 U.S.C. § 1744(b) (1976). Appellants clearly did not comply with this requirement. Therefore, under the provisions of section 314(c)

of FLPMA, 43 U.S.C. § 1744(c) (1976), the failure to file this document constitutes a conclusive presumption of abandonment.

Appellants advert to testimony given by Frank Gregg, Director of BLM, before the House Subcommittee on Public Lands on November 27, 1979, as indicating that his late filing should be accepted. Apparently appellants are referring to the response given by Director Gregg on the issue of BLM's handling of late and incomplete filings under section 314. Director Gregg stated:

Roughly, 1,400 claims have been received since the deadline expired, and an as yet unknown number of those filed before the deadline expired were incomplete. We are required to treat both types of claims as unacceptable. However, we are notifying the owners of these claims that, if the lands remain open to operation under the Mining Law, they can locate new claims and simply file them within 90 days, under the terms of Section 314 of FLPMA. We are processing these invalid claims on a priority basis to give the filers opportunity to re-locate and re-file quickly.

There is another refinement of the filing deadline problem. There are likely to be people who filed in good faith before the deadline, whose filings were incomplete and to whom we responded with instructions for completing the filing. If they failed to meet filing requirements before the expiration date, their claims are still technically invalid under the law. This is one of those fascinating little technicalities that give lawyers a field day. While we are required to consider claims that fit this situation as technically invalid, we are paring down the requirements to the bare legal minimum. That is, if the claimant had (1) filed a claim notice or reasonable evidence of such, (2) a notice of the current year's assessment, and (3) paid the \$5.00 filing fee, then the applicant will be given additional time to complete the balance of the requirements. If these minimum requirements have not been met, we have no choice but to reject the filing and the claim will be considered abandoned. [Emphasis supplied.]

Appellants place special reliance on the underlined portion of the statement and argue that their submissions, which made specific reference to the State records where the notices of location were serialized, constitutes "reasonable evidence" of the notices of location. Appellants' reliance on this statement is misplaced.

The Director's reference to "reasonable evidence" is directed to the situation in which the notice of location is no longer available and the claim is being held pursuant to the provisions of 30 U.S.C. § 38 (1976). Section 38, in essence, provides that proof of possession

and working of a claim for a period of time equal to the State statute of limitations obviates the need to prove location or transfer of the claim to the present claimant. Obviously, a requirement that a claimant file a copy of a notice of location in such a situation would defeat the entire purpose of this statute. This, we believe, is what the Director referred to in his statement.

Appellants do not purport to hold their claim under 30 U.S.C. § 38 (1976). On the contrary, they clearly base their rights from the 1950 notices of location. Thus, they were required, by the statutory language, to file a copy of the notice on or prior to October 22, 1979. This they did not do.

[3] Finally, appellants in their statement of reasons for appeal contend that the FLPMA violates the United States Constitution, more specifically the 14th Amendment. The Board adheres to its earlier holdings that the Department, as an agency of the Executive Branch of the Government, is not the proper forum to decide whether a statute enacted by Congress is constitutional. Alaska District Council of the Assemblies of God, Inc., 8 IBLA 153 (1972); Masonic Homes of California, 4 IBLA 23, 78 I.D. 312 (1971). If an enactment of Congress were to be in conflict with the Constitution, it is within the authority of the Judicial Branch, not the Executive Branch, to so declare. Charlie Canal, 43 IBLA 10 (1979); Al Sherman, 38 IBLA 300 (1978). Neither FLPMA nor the regulations provides any leeway in the application of the penalty for failure to file this information.

We note that appellants may relocate these claims and file notice of this as provided in 43 CFR 3833.1, subject to any intervening rights of third parties, and assuming no intervening closure of the land to mining location.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski

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Administrative Judge

We concur:

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Anne Poindexter Lewis  
Administrative Judge

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Bernard V. Parrette  
Chief Administrative Judge

